APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

(Decided July 12, 1955)

No. 419-52

NATIONAL SURETY CORPPORATION v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON, THIRD PARTY DEFENDANT

No. 149-53

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES. THE FIRST NATIONAL BANK IN HOUSTON, INTERVENOR

Mr. Emanuel Harris for National Surety Corporation and Fidelity and Deposit Company of Maryland, and *Mr. M. U. S. Kjorlaug* for First National Bank in Houston. *Messrs. Max E. Greenberg* and *Boyles & Billingsley* were on the briefs.

Mr. Walter Kiechel, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

These cases involve contests between surety companies on a defaulting contractor's payment bonds and a bank which sues under an assignment of the moneys due on the contracts given by the contractor to secure loans by the bank.

In both cases, on default of the contractor, the sureties paid laborers and material men to whom the contractor was indebted for labor and material furnished in the performance of the contracts. They claim subrogation to their rights against the contractor and to the rights of the United States on the bonds.

1. Contests between a bank and a surety company have been before this court in a number of cases. The most recent are *Modern Industrial Bank v. United States*, 101 C. Cls. 808; *Hardin County Savings Bank et al. v. United States*, 106 C. Cls. 577; and *Royalty Indemnity Co. v. United States*, 117 C. Cls. 736. In each case we have decided that the equity of the surety company was superior to the rights acquired by the bank under a valid legal assignment. In so holding, we have relied primarily upon the decisions of the Supreme Court in *Prairie State Bank v. United States*, 164 U.S. 227, and *Henningsen v. United States Fidelity and Guaranty Co.*, 208 U.S. 404. In *United States v. Munsey Trust Co.*, 332 U.S. 234, at page 240, the Supreme Court said:

> * * * From *Prairie State Bank v. United States*, 164 U.S. 227, to *American Surety Co. v. Sampsell*, 327 U.S. 269, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. * * *

We reiterate our former opinion that the equity of the surety company is superior to the rights of the bank acquired under an assignment, whether the surety's rights are derived from the discharge of its liability on a performance bond or on a payment bond. In *Prairie State Bank*, *supra*,

the surety had discharged its liability on a performance bond, and in *Henningsen, supra,* its liability on a payment bond.

No one seems to deny that the rights of a surety on a performance bond are superior to the rights of a bank as the contractor's assignee. This is because, as held in the *Prairie State Bank* case, the surety is subrogated to the rights of the United States, and the United States had the right to use the money in its hands to complete the contract on the default of the contractor. Hence, the surety having completed the contract, it was entitled to the money. It was entitled to it as against the bank because its rights of subrogation arose at the time it executed the bond, which was prior to the assignment to the bank.

But it is said, notwithstanding the holding in the *Henningsen* case, that this is not true in the case of a surety on a payment bond. The theory is that the United States is under no legal obligation to pay laborers and materialmen *(United States v. Munsey Trust Co.,* 332 U.S. 234), that all it is interested in is getting its building, and if it gets it, it does not care who gets the money left in its hands, whether the laborers and materialmen, or some bank to whom the defaulting contractor had assigned it.

This is contrary to the holding in the *Henningsen* case. The decision in that case was based on the discharge by the surety of the equitable obligation of the United States to see that the laborers and materialmen were paid.

Customarily, in a construction contract between private parties, laborers and materialmen have a lien on the building to secure payment of their claims; hence, if a contractor fails to pay laborers and materialmen, the owner of a private

building has the right to use any money owing to the contractor to discharge his obligation to the laborers and materialmen. His right to do this is superior to the rights of an assignee. But a building erected for the United States is not subject to a lien, and the United States is under no legal liability to pay laborers and materialmen; but it is under an equitable obligation to do so. To discharge this equitable obligation, Congress passed the Miller Act (49 Stat. 793), carrying forward prior acts and enlarging them, which requires the execution of a payment bond payable to the United States as a condition precedent to the letting of a Government contract. Under such bond the surety guarantees the payment of laborers and materialmen, and upon performance of this obligation, it relieves the United States from its equitable obligation to see that the laborers and materialmen are paid. For this reason it is subrogated to the right of the United States to apply this money to the payment of laborers and materialmen, in the discharge of its equitable obligation, although the United States was under no legal liability to do so. Since the right of the United States to so use the money is superior to the bank's rights as the contractor's assignee, the right of the surety who pays them is superior to the bank's right.

There would seem to be no doubt of the right of the United States to use the contractor's money in its hands to discharge the contractor's obligation to laborers and materialmen. One of the obligations assumed by the contractor under his contract with the United States was to pay laborers and materialmen. If he fails to do so, the United States has the right to use money due him to do what he agreed to do. It would be inequitable for the United States to retain the benefits of what the laborers and materialmen had done for it and pay to some one else money which the

contractor should have paid to them. See *Henningsen v. United States Fidelity and Guaranty Co., supra.*

Since the United States is under an equitable obligation to see that laborers and materialmen are paid, as held in the *Henningsen* case, *supra,* the laborers and materialmen have the equitable right to assert a claim to moneys in the hands of the defendant which are due the contractor. When the surety pays the laborers and materialmen, it becomes subrogated to their right to assert an equitable claim to the moneys in the hands of the defendant. It has frequently been held that they have equitable priority to these moneys over the general creditors of the contractor and over his assignees. *Greenville Savings Bank v. Lawrence,* 76 Fed. 545 (C.C.A. 4); In re *P.McGarry and Son,* 240 Fed. 400 (C.C.A. 7); *Belknop Hardware Co. v. Ohio River Co.,* 271 Fed. 144 (C.C.A. 6); *American Surety Co. v. Westinghouse Electric Mfg. Co.,* 75 F. 2d 377 (C.C.A. 5), affd. 296 U.S. 133; and *Martin v. National Surety Co.,* 85 F. 2d 135 (C.C.A. 8), affd. 300 U.S. 588.

See also our opinion in *John A. Hadden, Trustee, v. United States,* No. 50038, this day decided.

In *United States v. Munsey Trust Co., supra,* the Supreme Court said that the United States was not legally liable to laborers and materialmen, but they did not say that laborers and materialmen could not assert an equitable claim to moneys in the hands of the United States payable under the contract. We think they can. To permit them to do so in no way interferes with the full exercise of the sovereign powers of the United States. It does not subject the defendant to liability beyond the amount it has in its hands confessedly due and owing to somebody.

Looked at from another light, the surety's rights are superior to the rights of the bank: It is settled that the surety's rights arising by subrogation or substitution relate back to the date of the execution of the surety bonds. *Prairie State Bank v. United States, supra; Henningsen v. United States Fidelity and Guaranty Co., supra;* and the cases following those decisions. Thereupon, there accrues to the surety the equitable right to the moneys due from the Government to the contractor to the extent that the surety discharges the contractor's obligation to the Government.

Subsequently, the contractor, under the burden of this obligation to the surety, goes to a bank to borrow money. He tells the bank that he has this contract with the Government and offers to assign to the bank moneys to become due thereunder. He may or may not tell the bank that he has executed bonds to secure the faithful performance of the contract, but whether or not he does, the bank is charged with notice thereof, because of the requirement of the Miller Act, *supra.* Not only is the bank charged with notice thereof, but it is inconceivable that it did not have actual notice thereof. Hence, when the bank lends the contractor money, it lends him the money with knowledge of the fact that he has previously obligated himself to the surety to turn over to it any money to which he is entitled under the contract, to indemnify the surety for any loss it may sustain on the bonds. This is an obligation already incurred and, therefore, any obligation which the contractor may assume to the bank must be subject to his prior obligation to the surety. The bank, therefore, lends the money under the risk that there will not be enough left to pay its debt after the contractor's prior obligation to the surety has been satisfied.

Furthermore, it does not affirmatively appear in this case

whether or not the money borrowed from the bank was used in the performance of these contracts, and, if so, which of the two. The purpose of the 1940 amendment to the Assignment of Claims Act (41 U. S. C. 15; 61 Stat. 501; 65 Stat. 41) was to enable a contractor to obtain money to finance his contracts with the United States. If the money borrowed was not used in the performance of the contract, the lender is not equitably entitled to the benefit of the assignment.

We reiterate what we have said in prior cases that the 1940 amendment to the Assignment of Claims Act, *supra,* was intended to do nothing more than to remove the prohibition embodied in Revised Statutes 3477 and 3737, against assignment of a claim against the United States in the case of a financial institution lending money to a contractor with the Government. Prior to the passage of the amendment, the contractor could not assign his claims against the Government, but under this Act he was permitted to do so to a financial institution. However, under the assignment, the bank, insofar as prior obligations were concerned, received no more than it would have gotten had Revised Statutes 3477 and 3737 not been enacted.

Notwithstanding the passage of the amendment, the issue since its passage is the same as it was when the *Prairie State Bank* case and the *Henningsen* case were decided, to wit, who has the superior equity, the surety or the bank.

We recognize that the Fifth Circuit takes the contrary view in *Coconut Grove Exchange Bank v. The New Amsterdam Casualty Co.,* 149 F. 2d 73, and *General Casualty Co. v. Second National Bank of Houston,* 178 F. 2d 679.

2. In the National Surety Company case, the First National Bank in Houston also claims under an assignment

executed under article 260-1 of Vernon's Civil Statutes of the State of Texas. This assignment was executed on January 30, 1950. The contract in the National Surety Company case was entered into on September 1, 1950, and, hence, the statute relied upon is not applicable because it relates to the assignment of accounts due or to become due "under an existing contract." This contract not having been in existence at the time of the assignment, amounts due under it are not covered by the assignment. It was so held by the Texas Court of Civil Appeals in *Kieran v. Salley*, 244 S.W. 2d 663. The same thing was held by the United States District Court for New Jersey concerning a similar statute, in the case of *Seaboard Surety Co. v. State of North Dakota*, 94 F. Supp. 177. The surety's assignment was by operation of law, which does not appear to be covered by the Texas statute.

In the Fidelity and Deposit Company of Maryland case, the bank relies also upon the assignment executed under article 260-1 of Vernon's Civil Statutes of the State of Texas. That contract was executed prior to the assignment and, hence, accounts due under the contract would have been covered by the assignment, but the surety's rights arose when the contract with the United States was signed, which was prior to the assignment to the bank and, hence, the surety's rights are superior.

3. The bank says that the sureties are claiming only as the assignees of the trustee in bankruptcy of the contractor, Thomas Bryan & Associates, Inc., and that, therefore, they are entitled to recover only if the contractor is entitled to recover, and it says that the contractor is not entitled to recover as against the bank because of its assignment to the bank. This is in error.

The trustee in bankruptcy did assign "all claim and right to the balance on the above contract to National Surety Corporation and does hereby consent to the payment of said balance to said National Surety Corporation." But the sureties do not rely alone upon this assignment; they rely upon their right of subrogation as the sureties on the contractor's bonds, which rights arose long prior to the assignment to the bank. There is nothing to show that when the sureties accepted the assignment from the trustee in bankruptcy they intended to forego all their other rights.

The order of the court in the bankruptcy proceedings made no reference to the conflicting claims of the sureties and the bank.

4. The Fidelity and Deposit Company of Maryland was the surety on the payment and performance bonds on contract AT (29-1)-838, and the National Surety Corporation was the surety on the performance and payment bonds on contract AT (29-1)-994. The parties have stipulated that the amount due by the defendant on both of these contracts is $166,159.95, less an amount of $45,429.58 which the contractor owes the defendant for taxes. This leaves an amount due by defendant on both contracts of $120,730.37.

It is agreed that the $45,429.58 due the defendant for taxes shall be apportioned between the amounts due by the defendant on contracts AT (29-1)-838 and AT (29-1)-994 in proportion to the amounts due on each contract.

On each contract the sureties have paid amounts largely in excess of the amounts now due by the defendant on said contracts.

According to the stipulation of the parties, including the Government, on contract AT (29-1)-994, on which the Na-

tional Surety Corporation was surety, there is due, before taxes, the sum of $100,918.34. On contract AT(29-1)-838, on which Fidelity and Deposit Company of Maryland was surety, there is due the sum of $65,241.61. According to the stipulation, therefore, there is to be deducted from the $100,-918.34, which the plaintiff National Surety Corporation is entitled to recover, the sum of $27,591.95 for taxes, and there is to be deducted from the amount of $65,241.61, which the Fidelity and Deposit Company of Maryland is entitled to recover, the sum of $17,837.63 for taxes.

Judgment will be entered in favor of the National Surety Corporation for the sum of $73,326.39, and in favor of the Fidelity and Deposit Company of Maryland in the sum of $47,403.98.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

LARAMORE, *Judge*, dissenting:

I respectfully dissent for the same reasons as those set forth in my dissenting opinion in the case of *John A. Hadden, Trustee v. United States*, No. 50038, this day decided.

JONES, *Chief Judge*, joins in the foregoing dissent.

FINDINGS OF FACT

The court, having considered the evidence, the stipulation of facts entered into between the parties, and the briefs and argument of counsel, makes findings of fact as follows:

FINDINGS RELATING TO CLAIM OF NATIONAL SURETY CORPORATION, NO. 419-52

1. The plaintiff, National Surety Corporation, is a corporation duly organized under the laws of the State of New York and is authorized to carry on the business of Surety in

the State of New York, all the States of the United States and the District of Columbia.

2. On or about September 1, 1950 Thomas Bryan and Associates, Inc., hereinafter referred to as the Contractor, duly entered into a contract with the United States of America, through the United States Atomic Energy Commission, hereinafter called the Government, for the construction of Group 138, Buildings and Facilities, TA-16, Project D, Los Alamos, New Mexico, known as Contract No. AT (29-1)-994 at an estimated price of $673,860, the price of which was adjusted by modification to $609,618.73.

3. At or about the time of the execution of said contract and in compliance with the Miller Act, 40 U. S. C. 270a, c. 642, Sec. 1, 49 Stat. 793, the Contractor, as Principal, and the plaintiff, as Surety, executed two bonds to the Government, each in the penal sum of $336,930, one of said bonds to secure the performance of said contract, and the other of said bonds to secure the payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract.

4. In consideration of premium in the sum of $6,096.18 and indemnity agreement dated on or about May 29, 1950, and written application dated on or about September 1, 1950, the plaintiff executed the aforesaid bonds, and under said application and indemnity agreement the Contractor agreed in part, as follows:

> If any such bond be given in connection with a contract, the Surety is hereby authorized, but not required, (a) to consent to any change in the contract or in the plans and specifications relating thereto; (b) from time to time to make or guarantee advances or loans for the purposes of the contract without the necessity of see-

ing to the application thereof, it being understood that the amount of all such advances or loans shall be conclusively presumed to be a loss hereunder; (c) in event of the abandonment, forfeiture or breach of the contract or the breach of any bond given for the performance thereof or in connection therewith or the failure, neglect or refusal to pay for labor or materials used in the prosecution of the contract, to take possession of the work under the contract and, at the expense of the Indemnitors, to complete the contract or cause the same to be completed or to consent to the completion thereof, and to take any other action which the Surety, in its sole discretion, may deem appropriate; and the Indemnitors hereby assign, transfer and set over to the Surety (to be effective as of the date of such bond, but only in the event of abandonment, forfeiture, breach, failure, neglect or refusal, as aforesaid) all of their rights under the contract, including their right, title and interest in and to (1) all sub-contracts let in connection therewith, (2) all machinery, plant, equipment, tools and materials which shall be upon the site of the work or elsewhere for the purposes of the contract, including all materials ordered for the contract, and (3) any and all sums due under the contract at the time of such abandonment, forfeiture, breach, failure, neglect or refusal, or which may thereafter become due, and the Indemnitors hereby authorize the Surety to endorse in the name of the payee and to collect any check, draft, warrant or other instrument made or isued in paymnet of any such sum and to disburse the procedes thereof.

5. The Contractor proceeded with the work as provided by the contract and prosecuted the same until on or about March 3, 1951, when the Government accepted the contract as completed.

6. The Government made payment to the Contractor in the sum of $501,617.26.

7. The Contractor was indebted to the Government in the sum of $7,083.13 arising out of the Contractor's operations under Contract No. AT (29-1)-994 as follows: $4,780.77 for miscellaneous small claims, and $2,302.36 cost of replacing certain vitrified clay pipe.

8. Thomas Bryan and Associates, Inc., the Contractor, is indebted to the Government in the amount of $45,429.58 for withholding taxes for the fourth quarter of 1950 and Federal Unemployment Taxes for the years 1949 and 1950, including interest to the date of filing of the bankruptcy petition, to wit, February 24, 1951. Check No. 825 payable to the Collector of Internal Revenue, drawn on The First National Bank in Houston, in the amount of $42,-106.26, was issued on January 31, 1951, but was returned on account of insufficient funds. The records of the Contractor showing the breakdown of said amount is appended to the stipulation of facts as Exhibit D.

9. Creditors of the Contractor who had furnished labor and materials in connection with the performance of the said contract were unpaid for their work and materials supplied in the prosecution of the contract work in the sum of $295,255.64 and made demand upon the plaintiff for the payment thereof and that by reason thereof the plaintiff was compelled to accept liability therefor and pay in accordance with its obligation of its said payment bond, sums aggregating $295,255.64 to the creditors of the Contractor in settlement of claims for labor and materials supplied to the Contractor in the prosecution of the work provided for in said contract, no part of which sum has been refunded or paid to the plaintiff by the Contractor or anyone else.

10. The First National Bank in Houston, of Houston, Texas, third party defendant in this case, also makes claim

to the unexpended balance on said contract upon an assignment to it from the Contractor of moneys due or to become due under the said contract executed on or about January 21, 1951, under the Assignment of Claims Act, 41 U. S. C. 15, 61 Stat. 501, 65 Stat. 41. A notice of said assignment was received by the plaintiff and was acknowledged as follows:

> Receipt is hereby acknowledged of the above notice and a copy of the above mentioned instrument of assignment. These were received at 9 A. M. on February 8, 1951 subject to a complete reservation of all our rights.

11. No action on the claim asserted herein has been taken by Congress or by any Department of the Government or in any judicial proceeding except as shown in findings 21 and 22, including the Tax Court of the United States, except that on or about March 29, 1951, on the application of John F. Lang as ancillary receiver for the Contractor in bankruptcy, a temporary injunction was issued in the District Court of the United States for the District of New Mexico enjoining and restraining C. R. McNeeley, Finance Officer of the Atomic Energy Commission, and J. A. Abbott, Disbursing Officer of the United States of America, from making any payments on account of any contracts with the said bankrupt otherwise than into the Registry of the said Court, or delivering any check on account of any such contract otherwise than into the Registry of said Court.

12. The third party defendant, First National Bank in Houston, is a national bank, duly organized under the Acts of Congress of the United States of America, with its principal place of business in Houston, Harris County, Texas.

13. On January 30, 1950, Thomas Bryan and Associates, Inc., a corporation, executed notice of assignment of accounts pursuant to Art. 260-1, Texas Civil Statutes, as follows:

THE STATE OF TEXAS }
COUNTY OF HARRIS }

NOTICE IS HEREBY GIVEN: That the undersigned has assigned and intends to assign to First National Bank of Houston, a national banking corporation domiciled in Houston, Harris County, Texas, whose mailing address is 201 Main Street, Houston 2, Texas, and the First National Bank of Santa Fe, New Mexico, one or more accounts receivable, as more particularly set forth in the assignment in writing, made, executed and delivered by said assignor to said bank, and in such other assignments as shall from time to time be made, executed and delivered by said assignor to said bank.

The mailing address of the assignor is M & M Building, Houston, Texas.

The legal residence of the assignor in the State of Texas is at Houston, Texas.

The principal office of the assignor in the State of Texas is at Houston, Texas.

Said assignor has only the following other places of business within the State of Texas: .....
....., Texas.

This notice of assignment shall be effective for a period of three years from its date.

IN WITNESS WHEREOF, the said assignor has executed these presents at Houston in the State of Texas, this Jan. 30, 1950.

THOMAS BRYAN AND ASSOCIATES, INC.
by s/s ROBERT W. HASTY, Treas.
by s/s CHARLES C. HEBING, V. P.

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, personally appeared Robert W. Hasty and Charles C. Hebing, known to me to be the person whose name is subscribed to the foregoing instrument in writing and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

IN WITNESS WHEREOF, I have hereto set my hand and seal of office this Jan. 30, 1950.

/s/ JAMES B. THOMAS
Notary Public in and for
Harris County, Texas.

This notice of assignment was filed of record in the office of the County Clerk of Harris County, Texas, on January 30, 1950, being instrument No. 220416, entered in the Chattel Mortgage Register, Vol. 410, Page 75.

14. The pertinent provisions of Article 260-1 of the Texas Civil Statutes are as follows:

Section 1. Definitions: In this Act unless the context otherwise requires:

(1) "Account" or "account receivable" means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract; (b) which right to payment is not secured by a chattel mortgage, a conditional sale contract, or other instrument which may be filed for record in a public office of this or another state of the United States and which instrument was given at or before the time the account was assigned and reserves the title to, or creates, a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a judgment, (B) a

negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument; and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor.

(2) "Assignee", "assignment", "assignor", and "debtor" are limited respectively to an assignee, assignment, assignor of, and debtor on an account receivable.

(3) "Contract" includes express contracts, written or oral, and implied contracts, such as an obligation to pay for goods received or services rendered without an express contract.

(4) "Assignment" means any transfer of an account, other than by operation of law, including but not limited to a transfer as security, the creation by agreement of a lien on an account, and sales of accounts.

Sec. 2. The assignment of any account or accounts may be protected by the execution and delivery by the assignor to the assignee of an instrument or instruments in writing, assigning such account or accounts and describing the account or accounts assigned with sufficient particularity to identify the same, and by the filing for record the "Notice of Assignment" as hereinafter provided for.

* * *

Sec. 6. Whenever any person, firm or corporation shall in good faith take a protected assignment of any account or accounts, which shall not have been satisfied, cancelled, or released by the assignor, all creditors of, and all subsequent assignees, purchasers and transferees of or from the assignor shall be conclusively deemed to

have received notice of such assignment, dating from the time of the filing for record of the notice of assignment hereinabove provided; and after such filing for record, no purchaser from the assignor, no creditor of any kind of the assignor, and no prior or subsequent assignee or transferee of the assignor, holding an assignment not protected, or holding an assignment under a notice of assignment subsequently filed for record, shall in any event have, or be deemed to have acquired, any right in the account or accounts so assigned or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights therein of the assignee named in such prior protected assignment.

* * *

15. On December 22, 1950, the third party defendant (hereinafter sometimes referred to as the bank) loaned and paid over to said Thomas Bryan and Associates, Inc. the sum of $125,000 evidenced by its promissory note of said date; that there is a balance due on said note in the amount of $109,005.42 with interest at the rate of 5% per annum from December 22, 1950. The bank at various times between January 30, 1950 and February 23, 1951, loaned and advanced funds to Thomas Bryan and Associates, Inc., of which there remains unpaid the amount of $302,730.78.

16. On December 22, 1950 simultaneously with execution of the above described note, said Thomas Bryan and Associates, Inc., executed an assignment to the bank of Invoice No. H-285, Contract No. AT (29-1)-994 directed to United States Atomic Energy Commission, Office of Santa Fe Operations, Los Alamos, New Mexico, by said Thomas Bryan and Associates, Inc., dated December 18, 1950, in the amount of $161,902.33 as security for repayment of the above described note.

17. On January 21, 1951, the said Thomas Bryan and Associates, Inc., pursuant to the Assignment of Claims Act

of 1940 (Title 31, Sec. 203 (U.S.C.A.) and to the provisions of Article 24 (a) (b) of the aforesaid Contract No. AT (29-1)-994, assigned to the bank all moneys due and to become due to said Thomas Bryan and Associates, Inc. under said Contract, and authorized and directed defendant to pay to the order of the bank all sums payable to the defendant under said Contract, as the same became due thereunder, and gave the bank full power and authority to collect and receive same.

18. Notice of said Assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 17), together with a true copy of the instrument of assignment, was mailed to General Accounting Office, Washington, D. C., under date of January 21, 1951, receipt of which was acknowledged by O. L. Voorhees for Chief, Contract Service Section, General Accounting Office at 3:30 P. M. February 6, 1951; and

Notice of said assignment pursuant to the Assignment of Claims Act of 1940 described above (finding 17), together with a true copy of the instrument of assignment, was mailed to Treasury Disbursing Agent, Albuquerque, New Mexico, under date of January 21, 1951, receipt of which was acknowledged by J. A. Abbott, Regional Disbursing Office, at 9:00 A. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 17), together with a true copy of the instrument of assignment, was mailed to C. L. Tyler, Contracting Officer, Los Alamos, New Mexico, under date of January 21, 1951, receipt of which was acknowledged by James J. Rose, Acting Director, Of. of Engr. & Contr. on behalf of R. E. Cole, Contracting Officer, U. S. Atomic Energy Commission,

Los Alamos, New Mexico, at 2:30 P. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 17), together with a true copy of the instrument of assignment, was mailed to National Surety Corporation, Rusk Building, Houston 2, Texas, under date of January 21, 1951, receipt of which was acknowledged by A. J. Reid, Ass't Secretary on behalf of National Surety Corporation, 4 Albany Street, New York, New York, at 9:00 A. M. on February 8, 1951, as set forth in Paragraph 10.

Article 24 (a) (b), Assignment of Rights, of the aforementioned Contract, provides:

> (a) Claims for monies due or to become due the contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.
>
> (b) In the event of any such assignment the assignee shall file four signed copies of a written notice of the assignment, together with one copy of the instrument of assignment, with each of the following:
>
> (I) General Accounting Officer.
>
> (II) The Contracting Officer.
>
> (III) The surety or sureties upon the bond or bonds, if any, in connection with this contract.
>
> (IV) The officer designated in this contract to make payments thereunder.

19. Unpaid loans from the bank to Thomas Bryan and Associates, Inc., were in existence at the time of said assignment set forth in finding 17, and other loans to Thomas Bryan and Associates, Inc., were made by the bank thereafter, but no loan was so made at the time said assignment was executed.

20. Neither the plaintiff nor the First National Bank in Houston has made any assignment of their claim to the unexpended balance of said contract or the moneys due thereunder except to the extent that the facts stated in findings 21 and 22 may constitute an assignment by the plaintiff.

21. On February 9, 1953, the United States District Court for the Southern District of New York made an order approving the compromise between the Fidelity and Deposit Company of Maryland, National Surety Corporation and John F. Lang, as Trustee of Thomas Bryan and Associates, Inc., bankrupt.

22. Pursuant to this order, on February 9, 1953, John F. Lang, as Trustee, Receiver and Ancillary Receiver of Thomas Bryan and Associates, Inc., executed an assignment to the plaintiff, National Surety Corporation, of all of its rights against the defendant.

FINDINGS REATING TO CLAIM OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND NO. 149-53

23. The plaintiff, Fidelity and Deposit Company of Maryland, is a corporation duly organized under the laws of the State of Maryland, and is authorized to carry on the business of Surety in all the states of the United States and the District of Columbia.

24. On or about November 29, 1949, Thomas Bryan and Associates, Inc., hereinafter referred to as the Contractor, duly entered into a contract with the United States of America, through the United States Atomic Energy Commission, hereinafter called the Government, for the construction of a steam and electric plant in Area TA-3, Los Alamos, New Mexico, known as Contract No. AT (29-1)-838, at an estimated price of $1,665,236.00, the final contract price of which was adjusted by modification to $1,705,295.55.

25. At or about the time of the execution of the said contract and in compliance with the Miller Act, 40 U. S. C. 270a, c. 642, Sec. 1, 49 Stat. 793, the Contractor, as Principal, and the plaintiff, as Surety, executed two bonds to the Government, each in the penal sum of $832,618.00, one of said bonds to secure the performance of said contract and the other of said bonds to secure the payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract.

26. In consideration of the premium in the sum of $16,652.36 and the application and indemnity agreement dated on or about December 1, 1949, the plaintiff executed the aforesaid bonds, and under said application and indemnity agreement the Contractor agreed, in part, as follows:

> The undersigned does or hereby do represent that the statements made herein as an inducement to the Fidelity and Deposit Company of Maryland (hereinafter called Company) to execute or procure the bond or bonds herein applied for, are true, and should the Company execute or procure said bond or bonds, does or do hereby agree, for the undersigned, the heirs, personal representatives and assigns of the undersigned, jointly and severally, as follows:

SECOND: to indemnify the Company against all loss, costs, damages, expenses and attorneys' fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained.

THIRD: that the Company shall have the right, and is hereby authorized but not required:

(a) In the event of any abandonment or forfeiture of the contract guaranteed by said contract bond or of any breach of said contract bond, to take possession of the work under said contract, and at the expense of the undersigned to complete, or to contract for the completion of, the same, or to consent to the re-letting or completion thereof by the obligee in said contract bond;

(b) to adjust, settle or compromise any claim, demand, suit or judgments upon said bond, or bonds, or any of them, unless the undersigned shall request the Company to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Company, at the time of such request, cash or collateral satisfactory to it in kind and amount, to be used in paying any judgment or judgments that may be rendered, with interest, costs and attorney's fees. * * *

FOURTH: to assign, transfer and set over and does and or do hereby assign, transfer and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract, but only in the event of (1) any abandonment, forfeiture or breach of said contract, or of any breach of said bond or bonds, or any of them, or of any

other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment, or trustee for the undersigned, whether insolvent or not; * * *

(b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in or growing in any manner out of said bond or bonds, or any of them; * * *

(d) Any and all percentages retained on account of said contract and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; * * *

FIFTH: that liability hereunder shall extend to, and include the full amount of any and all sums paid by the Company in settlement or compromise, in good faith, of liability, loss, costs, damages, expenses and attorneys' fees, claims, demands, suits and judgment as aforesaid; an itemized statement thereof, sworn to by any officer of the company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suits hereunder, and in any and all matters arising between the undersigned and the Company.

27. The Contractor proceeded with the work and prosecuted the same until February 23, 1951.

28. On February 23, 1951, the Contractor stopped work under said contract.

29. Upon the default of the Contractor, the Government relet the work for completion to E. C. Pritchett Co. under Contract No. AT (29-1)-1149 in the sum of $83,418.56, to Wills Electric Company under Contract No. AT (29-1)-1158, in the sum of $87,363.00 and to W. D. Gunnells Co. under Contract No. AT (29-1)-1188, in the sum of $21,840 in the total sum of $192,621.56.

30. The Contractor was indebted to the Government in the sum of $11,764.78 for miscellaneous items arising out of the Contractor's operations under Contract No. AT (29-1)-838 as follows:

Materials and Services furnished	$1,891.45
Rental for White Rock Housing assigned to contractor under this contract	9,459.40
Utilities furnished for contractor's office at Los Alamos (prorated between this contract and Contract No. AT (29-1)-994)	31.08
Rental for White Rock Housing held by contractor (prorated)	146.25
AEC communications service account (unpaid telephone bills prorated)	182.49
Medical services furnished by Los Alamos Medical Center to contractor's employees for job incurred injuries (prorated)	54.11

31. Thomas Bryan and Associates, Inc., the Contractor, is indebted to the Government in the amount of $45,429.58 for withholding taxes for the fourth quarter of 1950, and Federal Unemployment Taxes for the years 1949 and 1950, including interest to the date of the filing of the bankruptcy petition, to wit, February 24, 1951. Check No. 825 payable to the Collector of Internal Revenue drawn on the First National Bank in Houston in the amount of $42,106.26 was issued on January 31, 1951, but was returned on account of insufficient funds. The records of the contractor showing

the breakdown of said amount are appended to the stipulation of facts as Exhibit D.

32. The Government made payment to the Contractor in the sum of $1,434,992.60.

33. The Contractor was indebted to the Government in the sum of $7,083.13 arising out of the Contractor's operations under Contract No. AT (29-1)-994 as follows: $4,780.77 for miscellaneous small claims, and $2,302.36 cost of replacing certain vitrified clay pipe.

34. At the date of the Contractor's default, February 23, 1951, there had been assessed by the Government liquidated damages arising out of Contract No. AT (20-1)-838 in the amount of $63,075.00, computed as follows:

(1) No. 1 Turbo-Generator Unit to be completed November 1, 1950; delay from November 2, 1950 to February 23, 1951.

114 days at $400 per day $45,600

(2) No. 2 Turbo-Generator Unit to be completed December 1, 1950; delay from December 2, 1950 to February 23, 1951.

84 days at $200 per day $16,800

(3) Telephone cable facilities to be completed August 1, 1950; were completed August 28, 1950.

delay of 27 days at $25 per day 675

Total $63,075

The total liquidated damages assessed by the Government against the Contractor on Contract No. AT (29-1)-838 in the amount of $103,475.00 for delays in the completion of said contract were computed as follows:

(1) The No. 1 Turbo-Generator Unit was accepted under contract AT (29-1)-1149 as of April 25, 1951. This is an over-run in time of 175 days (Nov. 2, 1950 to April 25, 1951). The liquidated damages for this unit were assessed for 175 days at $400.00 per day amounting to a total of $70,000.00.

(2) The No. 2 Turbo-Generator Unit was accepted under Contract AT (29-1)-1149 as of May 14, 1951. This is an over-run in time of 164 days (Dec. 2, 1950 to May 14, 1951). The liquidated damages for this unit were assessed for 164 days at $200.00 per day amounting to a total of $32,800.00.

(3) The telephone cable facilities were completed as of August 28, 1950. This is an over-run in time of 27 days (Aug. 2, 1950 to Aug. 28, 1950). The liquidated damages for this installation were assessed for 27 days at $25.00 per day amounting to a total of $675.00.

35. Creditors of the Contractor who had furnished labor and materials in connection with the performance of the said contract were unpaid for their work and materials supplied in the prosecution of the contract work in the sum of $341,769.86 and made demand upon the plaintiff for the payment thereof and that by reason thereof the plaintiff was compelled to accept liability therefor and pay, in accordance with its obligation of its said payment bond, sums aggregating $341,769.86 to the creditors of the Contractor in settlement of claims for labor and materials supplied the Contractor in the prosecution of the work provided for in said contract, no part of which sum has been refunded or paid to the plaintiff by the Contractor or anyone else.

36. No action on the claim asserted herein has been taken by Congress, or by any Department of the Government or

in any judicial proceeding except as shown in findings 45 and 46, including the Tax Court of the United States, except that on or about March 29, 1951 on the application of John F. Lang, as ancillary receiver for the Contractor in bankruptcy, a temporary injunction was issued in the District Court of the United States for the District of New Mexico enjoining and restraining C. R. McNeeley, Finance Officer of the Atomic Energy Commission, and J. A. Abbott, Disbursing Officer of the United States of America, Atomic Energy Commission from making any payments on account of any contracts with the said bankrupt otherwise than into the Registry of the said Court, or delivering any check on account of any such contract otherwise than into the Registry of said Court.

37. The Intervenor in this case, First National Bank in Houston, is a national bank, duly organized under the Acts of Congress of the United States of America, with its principal place of business in Houston, Harris County, Texas.

38. The Intervenor, First National Bank in Houston, at various times between January 30, 1950 and February 23, 1951, loaned and advanced funds to Thomas Bryan and Associates, Inc., of which there remains unpaid the amount of $302,730.78.

39. On January 30, 1950, Thomas Bryan and Associates, Inc. executed notice of assignment of accounts pursuant to Art. 260-1, Texas Civil Statutes. (See finding 13.)

40. On January 21, 1951, the said Thomas Bryan and Associates, Inc., pursuant to the Assignment of Claims Act of 1940 (Title 31, Sec. 203, U.S.C.A.) and to the provisions of Article 24 (a) (b) of the aforementioned Contract No. AT (29-1)-838, assigned to the Intervenor all moneys due and to become due to said Thomas Bryan and Associates, Inc.

under said Contract and authorized and directed defendant to pay to the order of Intervenor all sums payable by the defendant under said Contract, as the same become due thereunder, and gave Intervenor full power and authority to collect and receive same.

41. Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 40), together with a true copy of the instrument of assignment, was mailed to the General Accounting Office, Washington, D. C. under date of January 21, 1951, receipt of which was acknowledged by O. L. Voorhees for Chief, Contract Service Section, General Accounting Office at 10:00 A. M. February 6, 1951; and

Notice of said assignment pursuant to the Assignment of Claims Act of 1940 described above (finding 40), together with a true copy of the statement of assignment, was mailed to Treasury Disbursing Agent, Albuquerque, New Mexico, under date of Januray 21, 1951, receipt of which was acknowledged by J. A. Abbott, Regional Disbursing Office, at 9:00 A. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 40), together with a true copy of the instrument of assignment, was mailed to C. L. Tyler, Contracting Officer, Los Alamos, New Mexico, under date of January 21, 1951, receipt of which was acknowledged by James J. Rose, Acting Director, Of. of Engr. & Constr. on behalf of R. E. Cole, Contracting Officer, U. S. Atomic Energy Commission, Los Alamos, New Mexico, at 2:30 P. M. on February 5, 1951; and

Notice of said assignment, pursuant to the Assignment of Claims Act of 1940, described above (finding 40), together with a true copy of the instrument of assignment, was

mailed to Fidelity and Deposit Company of Maryland, City National Bank Building, Houston 2, Texas, under date of January 21, 1951, receipt of which was acknowledged by E. B. McCahan, Jr., Vice-President, on behalf of Fidelity and Deposit Company of Maryland, 606 Fidelity Building, Baltimore 3, Maryland, at 2:00 P. M. on February 5, 1951, subject to the reservation by the plaintiff of all its rights, equity or priorities whether by agreement, subrogation or common law or statute law.

Article 24 (a) (b), Assignment of Rights, of the aforementioned General Contract, provides:

> (a) Claims for monies due or to become due the contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.
>
> (b) In the event of any such assignment the assignee shall file four signed copies of a written notice of the assignment, together with one copy of the instrument of assignment, with each of the following:
>
> (I) General Accounting Office.
>
> (II) The Contracting Officer.
>
> (III) The surety or sureties upon the bond or bonds, if any, in connection with this contract.
>
> (IV) The officer designated in this contract to make payments thereunder.

42. The pertinent provisions of Article 260-1 of the Texas Civil Statutes are set forth in finding 13.

43. Unpaid loans from Intervenor Bank to Thomas Bryan and Associates, Inc. were in existence at the time of said assignment set forth in finding 40, and other loans to Thomas Bryan and Associates, Inc. were made by Intervenor Bank but no loan was so made at the time said assignment was executed.

44. Neither the plaintiff nor the intervenor have made any assignment of their claims to the unexpended balance on said contract or the money due thereunder except to the extent that the facts stated in findings 45 and 46 may constitute an assignment by the plaintiff.

45. On February 9, 1953, the United States District Court for the Southern District of New York made an order approving the compromise between the Fidelity and Deposit Company of Maryland, National Surety Corporation and John F. Lang, as Trustee of Thomas Bryan and Associates, Inc., bankrupt.

46. Pursuant to the above order, on February 9, 1953, John F. Lang, as Trustee, Receiver and Ancillary Receiver of Thomas Bryan and Associates, Inc., executed an assignment to the plaintiff, Fidelity and Deposit Company of Maryland of all his rights against the defendant.

FINDINGS, BASED UPON STIPULATION, OF GENERAL APPLICATION TO CLAIMS NOS. 419-52 AND 419-53

47. On June 16, 1954, the plaintiffs National Surety Corporation and Fidelity and Deposit Company of Maryland and the third party defendant, intervenor, First National Bank in Houston, submitted to the Attorney General an offer to compromise these actions insofar as the United States is concerned. Said offer of compromise was on September 7, 1954, duly accepted.

48. Plaintiffs and First National Bank in Houston agree and the court finds that defendant is justly entitled to the sum of $45,429.58 as taxes owing to defendant by the bankrupt contractor, Thomas Bryan and Associates, Inc., said taxes to be apportioned between the amounts owing by defendant on Contracts No. AT (29-1)-838 and No. AT (29-1)-994, and that judgment may be entered for defendant herein in said amount and set off against the amount due and owing by defendant on account of said contracts, as hereinafter set forth.

49. In addition, plaintiffs and First National Bank in Houston agree to waive their claims to recovery of (1) any part of the completion costs of Contract No. AT (29-1)-838 in the amount of $192,621.56, (2) $675.00 assessed by defendant as liquidated damages on Contract No. AT (29-1)-838, (3) $7,083.13, constituting miscellaneous charges arising out of the contractor's operations under Contract No. AT (29-1)-994, and (4) $11,764.78, constituting miscellaneous charges arising out of contractor's operations under Contract No. AT (29-1)-838.

50. Defendant agrees and the Court finds that there is due and unpaid, before deduction of the aforesaid $45,429.58 for taxes, on Contract AT (29-1)-838, the sum of $65,-241.61, and on Contract No. AT (29-1)-994, the sum of $100,918.34, totalling $166,159.95. Defendant accordingly shall make a net aggregate payment of the sum of $120,730.37, which results from deducting said sum of $45,429.58 due and owing to defendant for taxes from said sum of $166,159.95 being the balance due and owing by defendant on account of said contracts. The defendant shall hold said net sum of $120,730.37 pending the determination in these proceedings of the respective rights of the plaintiffs and the First National Bank in Houston

and the entry of an appropriate judgment by the Court determining such rights.

51. Plaintiffs, the First National Bank in Houston, and defendant have waived and abandoned any and all other claims heretofore asserted against each other touching any and all matters involved in these cases and each has agreed to accept the amounts hereinabove set forth in full settlement hereof.

52. This compromise is in no way related to or concerned with the income or other taxes to which plaintiff or the First National Bank in Houston are now or may in the future become liable as a result of this settlement, or otherwise.

53. The parties have made this settlement and stipulations for the purpose of enabling the Court, after it determines the respective rights of the plaintiffs and First National Bank in Houston, to (1) enter judgment for the party or parties determined to have the superior rights, and against the defendant, in the sum of $166,159.95 in full settlement of all claims set forth in plaintiffs' and third party defendant, intervenor's petitions, as above set forth, (2) enter judgment for the defendant and against the party or parties determined to have the superior rights, in the sum of $45,429.58 in full settlement of all claims set forth in defendant's counterclaim, as hereinabove set forth, (3) set off the liability of the party or parties determined to have the superior rights against defendant's liability, and to enter judgment in favor of the party or parties deemed to have the superior rights and against defendant for the net difference of $120,730.37. The parties agreed that in the event the stipulations are rejected in whole or in part by the Court, the entire stipulations should be void and of no effect whatsoever.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs National Surety Corporation and Fidelity and Deposit Company of Maryland are entitled to recover, and it is therefore adjudged and ordered that the National Surety Corporation may recover of and from the United States the sum of seventy-three thousand three hundred twenty-six dollars and thirty-nine cents ($73,326.39), and that the Fidelity and Deposit Company of Maryland may recover of and from the United States the sum of forty-seven thousand four hundred three dollars and ninety-eight cents ($47,403.98).

The petition of intervenor First National Bank in Houston is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 50038

(Decided July 12, 1955)

JOHN A. HADDEN, AS TRUSTEE IN BANKRUPTCY OF MANUFACTURERS TRADING CORPPORATION AND MANUFACTURERS DISCOUNT CORPORATION v. THE UNITED STATES

CONDENSER SERVICE & ENGINEERING CO., INC., ET AL., INTERVENORS

Mr. Theodore B. Wolf for the plaintiff. *Mr. Israel Akselrod* and *Messrs. Zalkin & Cohen* were on the briefs.

Mr. Harry I. Rand for the intervenors. *Mr. Solomon Dimond* was on the briefs.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Carl Eardley* was on the brief.

ON INTERVENORS' MOTION FOR A REHEARING

MADDEN, *Judge*, delivered the opinion of the court:

In this case the plaintiff is the trustee in bankruptcy for a financial institution which loaned money to the contractor, taking as security an assignment of the contractor's rights to receive payments from the Government for the performance of the contract. The intervenors are laborers and materialmen who furnished labor and materials to the contractor and have not been paid. The Government withheld a considerable sum which was otherwise due the contractor. The intervenors assert a right in that money superior to the right of the plaintiff.

The plaintiff sued for the amount withheld by the Government. The Government filed counterclaims for a total amount greatly in excess of the amount which it withheld. In several other cases brought by the same plaintiff, Nos. 50115, 49884, 48867, 413-52 and 49831, decided on April 5, 1955, the Government filed most of the same counterclaims, and the court held that the counterclaims were not valid as against the claims there asserted, except to the extent that they were used up as credits in favor of the Government in that case. The outcome of those cases was a judgment in favor of the plaintiff trustee in bankruptcy for $303,156.44. That judgment has now become final. The sum admittedly withheld by the Government in the instant case is some $66,000 larger than the amount of any counterclaims by the Government now on file and not already dismissed.

In our decision in the instant case, we held that the Government was not a mere stakeholder, and that therefore the principle announced in *Royal Indemnity Co. v. United States,* 117 C. Cls. 736, was not applicable. But, by our decision dismissing the counterclaims in the plaintiff's other cases referred to above, we made of the Government a mere stakeholder. In that situation, this court's decision in *Royal Indemnity Co. v. United States, supra,* the Supreme Court's dictum in *United States v. Munsey Trust Company,* 332 U.S. 234, recognizing its earlier decision in *Henningsen v. United States Fidelity and Guaranty Co.,* 208 U. S. 404, as well as numerous other decisions of this and other Federal courts, show that we should recognize the rights of these intervenors. In the cases referred to above, the plaintiff was a surety company, asserting rights derived from its payment of laborers and materialmen. If this right is enforcible, the laborers and materialmen, in whose shoes the surety

in those cases stood, must have had rights. *Greenville Sav. Bank v. Lawrence,* 76 Fed. 545 (C.C.A. 4); *In re P. McGary & Son,* 240 Fed. 400 (C.C.A. 7); *Belknap Hardware & Mfg. Co. v. Ohio River C. Co.,* 271 Fed. 144 (C.C.A. 6); *American Surety Co. v. Westinghouse Electric Co.,* 75 F. 2d 377 (C.C.A. 5) affirmed 296 U. S. 133; and *Martin v. National Surety Co.,* 85 F. 2d 135 (C.C.A. 8), affirmed, 300 U. S. 588, are other Federal court cases in which laborers and materialmen, or sureties who have paid them, are held to have an equitable priority in money owed by the United States to a contractor.

The intervenors' right is a right to the money, if any, owing by the United States to the contractor. If, as the litigation proceeds, it should develop that there is no such money, the intervenors will not be entitled to anything.

The motion of intervenors for a rehearing is granted, and the order contained in the opinion of April 5, 1955, granting plaintiff's motion for judgment on the pleadings dismissing the petition in intervention is vacated.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

LARAMORE, *Judge,* dissenting:

When this case was before the court on plaintiff's motion for judgment on the pleadings dismissing intervenor's petition, the United States was not a more stakeholder, and it was not necessary to express an opinion on the correctness of *Royal Indemnity Company v. United States,* 117 C. Cls. 736. But now the United States may be a stakeholder of about $66,000 and, if so, the *Royal Indemnity* case is indistinguishable. I believe that the *Royal Indemnity* case

should be overruled. I fail to see how the laborers and materialmen have any standing to sue in this court. Their claim is against the contractor, not the United States.

It is true that the Supreme Court held in *Henningsen v. United States Fidelity and Guaranty Company of Baltimore, Maryland,* 208 U. S. 404, that the surety on a payment bond had an equitable priority to the retained percentages where the bank and the surety were both asserting equitable claims. The United States was not a party to that suit and the District Court had jurisdiction as between the private parties under their general jurisdiction. It is also not clear from that decision what rights the surety was "subrogated" to. The cases relied upon by the majority, except *Munsey Trust, infra,* which I do not believe supports the majority, were all decided before the amendment to the Assignment of Claims Act in 1940, 31 U. S. C. § 203, 54 Stat. 1029, and the question of this court's jurisdiction was not involved. Also, the United States was not involved in those suits because it had already paid the money to the party it believed entitled thereto, except in the case of *Greenville Sav. Bank v. Lawrence, supra,* where the United States withheld money, pursuant to the contract, for no other purpose than the payment of laborers and materialmen.

It is also relevant to note that *Prairie State Bank v. United States,* 164 U. S. 227, was not before this court under our present jurisdictional act, but rather by reference under section 1063 of Revised Statutes.

In this case the plaintiff, trustee for the financial institution, is not asserting a mere equitable priority, but rather is asserting a valid legal claim under the Assignment of Claims Act as amended in 1940, supra. This amendment was enacted to encourage the private financing of Government contracts and should be so construed. *Central Bank*

v. United States, 345 U.S. 639, 646. The United States could properly and safely pay the funds to the holder of the valid assignment without subjecting itself to double liability. See *Martin v. National Surety Co., et al.,* 300 U. S. 588, and the cases cited for the proposition that the Act was for the protection of the Government and was to prevent the Government from becoming embroiled in disputes between the contractor and its creditors. The United States does not have to concern itself with the question of which person is ultimately entitled to money, it can pay the holder of a valid assignment under the Assignment of Claims Act, *supra.* But on the question of which party is ultimately entitled to the money see the *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.,* 149 F. 2d 73, and *General Casualty Co. of America v. Second National Bank of Houston,* 178 F. 2d 679, in which cases it was held that the financial institution has the superior claim over the surety on a payment bond by reason of the passage of the 1940 amendment to the Assignment of Claims Act, *supra.* Obviously, the majority opinion is in direct conflict with these cases.

The laborers and materialmen and their subrogees have no enforceable rights against the United States. *United States v. Munsey Trust Co., Receiver,* 332 U. S. 234. Having no rights against the United States, the intervenors are in the position of asking this court to litigate the rights of private parties over which this court has no jurisdiction. *United States v. Sherwood,* 312 U. S. 584, and the cases there cited. If the laborers and materialmen have a superior right against the plaintiff *inter sese* they may prosecute that action in the proper forum.

I would overrule intervenors' motion.

SEC. 203. ASSIGNMENTS OF CLAIMS VOID

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

[ASSIGNMENT OF CLAIMS ACT OF 1940]

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: ***Provided,***

1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of

1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—

(a) the contracting officer or the head of his department or agency;

(b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940, as amended, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department, or agency thereof, whether arising

from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the resident, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract, or- (4) taxes, social-security contributions, or the

withholding or nonwithholding of taxes or social-security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued. [R. S. sec. 3477; Acts of May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, sec. 1, 54 Stat. 1029, as amended by Act of July 26, 1947, 61 Stat. 501 and Act of May 15, 1951, P. L. 30, 82nd Cong., 1st Sess.]